IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 23

FIRST NATIONAL BANK OF ARIZONA, as successor executor of the last will and testament of GERALD B. WALDRON, Deceased,

Petitioner,

v.

CITIES SERVICE CO.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

WILLIAM E. KELLY,
DAVID ORLIN,
PREBEN JENSEN,
ALAN R. WENTZEL,
Counsel for Petitioner.

Of Counsel:
CASEY, LANE & MITTENDORF,
26 Broadway,
New York, New York 10004.

Counsel of Record:
WILLIAM E. KELLY,
26 Broadway,
New York, New York 10004.

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The following statement of the way this summary judgment was entered is sufficient, I think, to show the gross error of the Court's affirmance of the judgment.

In 1956 petitioner Waldron [1] brought suit against the Standard Oil Company (New Jersey) and six other major oil companies including Cities Service Co., the respondent here. The complaint alleged a general conspiracy beginning in 1928 on the part of all the defendants but Cities. It was alleged that Cities joined the conspiracy after the Government of Iran nationalized the properties of the Anglo-Iranian Oil Company in May 1951, and that the defendants conspired together to prevent petitioner Waldron from selling any of the Iranian oil. To carry out the boycott the alleged conspirators threatened all other companies with dire economic consequences if they dealt in the Iranian oil. Despite these threats, Cities, which did not control sources of oil adequate to supply its customers and which therefore had been compelled to buy from the major companies, expressed to petitioner a desire to obtain Iranian oil. Petitioner was offering to sell the Iranian oil on very attractive terms, and Cities agreed to go to Iran in order to evaluate the prospects, provided it received an invitation from Iranian Premier Mossadegh. Petitioner thereupon went to Iran, secured a written invitation from the Premier, and in due course the President of Cities Service, W. Alton Jones, went to Iran, taking with him other high Cities officials who, as experts, could help him appraise the possibilities of operating the old Iranian plants. Petitioner Waldron also went along. The investigation in Iran was made, but during the trip, Jones made a secret side-trip to Kuwait to pursue negotiations for buying oil from Gulf

[1] The original plaintiff Waldron, like several crucial witnesses in this case, is dead and this appeal is now being carried on by his executor. For the sake of clarity I will refer to the original plaintiff Waldron as the petitioner here.

Oil, one of the alleged conspirators. Jones' associates did not accompany him on this trip to Kuwait, and Cities made every effort to conceal the secret visit from petitioner. In fact, as late as 1960, during the course of this lawsuit, Cities continued to deny that Jones had ever gone to Kuwait while on the Iranian trip; the fact was not finally revealed until 1964 when petitioner was at last permitted to question some of the Cities officials who had been involved in the Iranian trip.

After the trip to Iran, Cities officials prepared a memorandum reporting favorably on the prospects for using Iranian oil, but then in October 1952 Cities abruptly informed Waldron that it had no further interest in the Iranian oil which petitioner was offering on such favorable terms. The intense pressure to which Cities was being subjected at this time by the major companies is suggested by an incident that occurred only a month later at the annual convention of the American Petroleum Institute. Jones, President of Cities, had been slated to receive the Institute's gold medal for being selected oil man of the year, but at the meetings representatives of the major companies threatened Jones that they would cut off Cities' supplies of its sorely needed crude oil if he dealt further in Iranian oil, and he was not presented with the gold medal. Three months later the agreement between Cities and Gulf for the purchase of the Kuwait oil was formally executed. Then, after petitioner's efforts to sell the Iranian oil had completely failed, the Iranian Government was forced to agree to turn over the nationalized properties to a Consortium of the major oil companies, and Cities was granted a small share in the Consortium.

Petitioner's antitrust complaint charged that Cities, which previously had eagerly pursued the prospect of purchasing Iranian oil, had changed its views and had foregone its chance to make the "billions" that Jones had

foreseen, in order to get the Kuwait oil and membership in the Consortium. After the complaint was filed, Cities examined petitioner at length, at the same time getting the court to postpone its time for answering the complaint until after these examinations could be completed. Then Cities filed affidavits charging that petitioner's allegations about the Kuwait and Consortium deals had no basis in fact and moving for summary judgment. The court deferred ruling on the summary judgment motion but at the same time refused to permit petitioner to obtain general discovery to enable him to prove his case aganst Cities: instead the court authorized a limited discovery relating only to the Kuwait purchase and the Consortium arrangement; petitioner's inquiry was also sharply limited both as to the subject matter and the time period of any transactions that could be questioned. At the same time the court refused to permit petitioner to take the deposition of Jones and those of his associates who had the greatest opportunity to know the reasons for the drastic change in Cities' attitude on buying Iranian oil. The Court instead ordered that only George H. Hill, a Cities vice-president who had never met petitioner or known anything about the Iranian oil deal but who had been in charge of negotiating the Kuwait deal and who had led Cities' attempts to obtain a share in the Consortium, would be required to answer petitioner's questions.

After taking the deposition of Hill, petitioner filed an amended complaint which eliminated his specific reliance on the Kuwait and Consortium deals and stressed generally that Cities' participation in the conspiracy had been obtained by threats and inducements from the principal conspirators. The court again postponed a ruling on Cities' motion for summary judgment, and ordered that petitioner be permitted to make some further discovery, but once again the scope of discovery permitted

to petitioner was sharply limited. In addition, Cities' president Jones had died during the period when petitioner was restricted by the court's order to taking only the deposition of Hill, and thus petitioner was never able to question the one man who was the crucial figure in the alleged Iranian transactions. Of the seven other Cities officials who had been involved in these transactions, three had also died during the long period in which the court had stayed petitioner from taking their depositions.

In spite of the fact that petitioner had amassed considerable evidence of Cities' liability, in spite of the fact that Cities had been given unrestricted freedom to question petitioner while petitioner was barred from getting any information at all from Cities employees familiar with the Iranian transactions, in spite of the fact that the discovery eventually allowed to petitioner had been sharply restricted, in spite of the fact that petitioner never had an opportunity to question four of the eight Cities officials who had been most intimately connected with the alleged transactions, and in spite of the fact that Cities had never been required to answer the allegations of the complaint, the court entered summary judgment for Cities in September 1965. 38 F. R. D. 170 (1965). The Court of Appeals, in a short, uninformative opinion, affirmed the decision of the District Court. 361 F. 2d 671 (C. A. 2d Cir., 1966).

I.

The Court's action in affirming this judgment cannot possibly be reconciled with this Court's holding in *Poller* v. *Columbia Broadcasting Co., supra.* There the Court warned against using summary judgments to decide complex antitrust litigation where motive and intent play leading roles. This is just such a case. Its complexity is such that even with a summary judgment it took 11 years to end it. Literally months and years were spent

in examining plaintiff, in getting affidavits and holding numerous hearings. It is little less than farcical to treat a case that eats up that much time as one suitable for a summary judgment. It certainly would not have taken one-tenth of that much time to give the case a full-dress trial, where sworn testimony before a jury rather than affidavits presented to a judge could have been used to adjudicate plaintiff's rights in accordance with due process of law. An excuse for summary judgments has always been that they save time. If the time has come when the best speed record they can make is to take 11 years to decide one of them, the idea of summary judgments as time-savers is a snare and delusion and the best service that could be rendered in this field would be to abolish summary judgment procedures, root and branch. The plain fact is that this case illustrates that the summary judgment technique tempts judges to take over the jury trial of cases, thus depriving parties of their constitutional right to trial by jury.

It seems clear to me that even with petitioner's very limited opportunity to gather evidence in support of his case, there is ample evidence in this record from which a jury could conclude that respondent Cities did indeed join the alleged conspiracy. Petitioner established that Cities needed Middle East oil, that he was offering Iranian oil on very attractive terms, and that Cities had in a number of ways manifested its considerable interest in purchasing this oil. Suddenly, Cities announced to petitioner that it did not intend to pursue the deal any further, and in fact took steps to make more difficult petitioner's efforts to sell the oil to others.[2] This refusal

[2] Thus, Cities' president, Jones, instructed an associate to cable the Secretary of the Interior to advise the United States Government against purchasing gasoline from petitioner for military use. Although in the Court's view this cable was "primarily" designed to

to deal could of course be explained by a number of motivations, but petitioner contends that this record raises the significant possibility that Cities action was predominantly motivated not by legitimate business considerations but rather by a decision to join the alleged conspiracy, induced either by threats of the conspirators or by a payoff in the form of the Kuwait and Consortium deals. The Court rejects each of these theories, although for sharply contrasting reasons, and concludes that despite the possible illegitimate motivations, evidence now in the record suggests that other motivations were, in the Court's opinion, more probable. As I have already indicated, I could never accept this as the appropriate standard, under *Poller, supra,* for determining whether a defendant in a case such as this is entitled to summary judgment.

II.

The Court in this case has deprived plaintiff of his right to discovery on highly technical and wholly indefensible grounds. The heart of the complaint here was that Cities Service and others conspired to boycott plaintiff's sale of Iranian oil by use of threats and monopoly power in violation of the antitrust acts. Rule 56 (e) comprehensively provides for the use of depositions and affidavits, and Rule 56 (f) provides that where it appears that affidavits are unavailable the Court may refuse the application for summary judgment, or may order a continuance to permit affidavits to be obtained, or make such other order as is just. Thus it appears that the

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disassociate Jones from petitioner's efforts to promote the sale, *ante,* p. 27, this is certainly a rather narrow view of a cable that explicitly states, "I seriously question wisdom of such action." In any event I cannot understand how this Court can justify taking from the jury the responsibility for judging the primary purpose and effect of a piece of evidence such as this.

rules contemplate that a party may not be shut off from an opportunity to get affidavits to give him his day in court. No judge is granted power under Rule 56 or any other rule to completely deny a party all opportunity to take depositions or to get affidavits essentially needed to get a fair trial of his case. Such a course of conduct cannot possibly be called "just" within the meaning of Rule 56 (f), and yet here this plaintiff, over a course of years, repeatedly pleaded with the district judge for an opportunity to examine Jones and other Cities Service employees particularly familiar with the Iranian oil deal in order to present facts he had no other way to obtain. Of course, a party who is suing a company and who is dependent for proof on company employees must have the force of the law behind him or he cannot get testimony from such employees against their company. That the rule makers did not intend any such burdens to be imposed upon discovery is also shown by Rule 27, which even authorizes depositions to be taken, before any suit is filed, by any person who fears or expects that he may be a party to an action.

The excuse given by the trial court for cutting off plaintiff's right to discovery here will not hold water. It was that by pleading at one time that there were two possible reasons for Cities joining the conspiracy to boycott, he was perforce eternally barred from examining the defendants about any reasons other than those two in order to get more complete information as to why they conspired. To uphold this view of the District Court is to treat a lawsuit as a game in which the party who gets there first with the most questions wins the game. But lawsuits are not games. The end of each one of them, if courts remain true to the ancient traditions of justice, is to try each case in a way that permits truth to triumph. That has not been done here. This

petitioner was and is yet entitled to examine the Cities Service employees still living who know about this case. Law and justice require it. Too much time has already been wasted in an effort to provide a summary disposition of a case that should not be disposed of that way.

I would reverse the case and direct that it go to trial.